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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Application of Open Network
Architecture and Nondiscrimination
Safeguards to GTE Corporation

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CC Docket No. 92-256

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FEDERAL COMMUNICATIONS COMMISSION
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GTE's COMMENTS

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its affiliated domestic
telephone operating companies

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SUMMARY

GTE demonstrates *infra* that its customers are already receiving the benefits of ONA/CEI; and that there is no significant incremental benefit to be derived from imposing the costly and burdensome *BOC Requirements* on GTE. The imposition on GTE for the first time of the *BOC Requirements* demands a supporting analysis that shows this action can be expected to yield net public interest benefits.

The markets for all exchange carrier services face competition today. Tomorrow they will be still more competitive. The Commission itself has recognized that the notion of an exchange carrier "bottleneck" is a diminished concern in today's competitive environment. While Commission policy favors reducing regulatory constrictions to permit exchange carriers to compete, the *Notice* proposes to go in the opposite direction by dramatically increasing regulatory costs and burdens for GTE as the environment becomes still more competitive.

On four occasions the Commission has closely examined GTE in comparison to the BOCs; the anti-trust court has done the same. In every case the outcome was a conclusion that important differences that deny GTE the opportunity and incentive to engage in anti-competitive conduct justify different treatment. The totality of these BOC/GTE differences represents an even stronger case than the Commission accepted in the past as justification for different regulatory treatment of GTE. In view of the foregoing, the *Notice* represents an unexplained departure from prior Commission policy.

A proposal to impose the *BOC Requirements* as a totality on GTE should be grounded on an understanding of these realities: (i) GTE's market position is far less favorable than that of the BOCs; (ii) the proportionate cost impact on GTE would be far greater; and (iii) GTE's ability to engage in anti-competitive activity is far less. The *BOC Requirements* imposed on GTE would generate significant tangible and intangible costs with little or no offsetting benefits.

Requirements imposed on GTE would generate significant tangible and intangible costs with little or no offsetting benefits.

GTE is already in full compliance with the majority of the *BOC Requirements* and has voluntarily implemented practices that meet the Commission's intent for the remainder:

(i) GTE's practices concerning CPNI achieve the FCC's goals to the extent possible given the special circumstances that affect GTE.

(ii) GTE is more than willing to satisfy *bona fide* ESP customer needs for OSS access if the four basic criteria established by the Commission for ONA services can be satisfied. Absent satisfaction of the Commission's own criteria, no requirement should be imposed on GTE.

(iii) Imposing on GTE the proposed reporting requirements would create disproportionate costs and yield few if any benefits.

(iv) Existing network information disclosure requirements applicable to GTE, coupled with limited GTE ability to discriminate against Enhanced Service competitors, obviate the need for the Commission to apply Phase II non-discrimination safeguard rules to GTE.

To illustrate the foregoing: Applying to GTE the reporting requirements on technical capability would give the Commission eight remarkably similar reports instead of seven remarkably similar reports – generating significant costs to obtain information of no real incremental value. Similarly, applying to GTE the automatic restriction aspect of CPNI where no customer privacy problem exists makes no sense. There has never been a Commission policy preventing a single GTE employee from marketing network services, Enhanced Services and Customer Premises Equipment -- and this is the only practical approach in areas of dispersed population where a separate sales person for each product is not economic. Applying to GTE automatic CPNI restrictions is either meaningless or it would imply a new restriction for GTE tantamount to a separation

In its own business interests, GTE is actively engaged in efforts to determine and satisfy ESP needs. GTE has implemented safeguards that satisfy the Commission's ONA goals and preclude discrimination against Enhanced Service providers; and offers ONA services comparable in number and functionality to those offered by the BOCs.

Applying to GTE the *BOC Requirements* would be costly and burdensome, and would provide no net public interest benefits. Application of the *BOC Requirements* to selected portions of GTE's territory would incur heavy costs far exceeding any conceivable benefit. The least damaging way to impose all or some portion of the *BOC Requirements* on GTE would be to formalize GTE's existing practices.

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GTE's COMMENTS

GTE Service Corporation and its affiliated domestic telephone operating companies (GTE), with reference to the Notice of Proposed Rulemaking (the *Notice* or *NPRM*), FCC 92-495 (released December 2, 1992), hereby submit the following comments:

BACKGROUND

The *Notice* (at para. 1) proposes "to apply to [GTE] the same regulatory framework of Open Network Architecture ["ONA"] that applies to the Bell Operating Companies [the "BOCs"] for GTE's participation in the [E]nhanced [S]ervices¹ market."²

Further, the *Notice* reaches the following tentative conclusions:

(i) "that the public interest will be served by applying to GTE the same ONA regulatory framework that governs the BOCs' participation in the enhanced services market" (para. 6);

¹ Section 64.702(a) of the Commission's rules defines "Enhanced Services" as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information."

² See *"Computer III", Amendment of Section 64.702*, CC Docket No. 85-229, Phase I, Report and Order, 104 F.C.C.2d 958 (1986) ("*Phase I Order*"), reconsideration, 2 FCC Rcd 3035 (1987) ("*Phase I Reconsideration Order*"), further reconsideration, 3 FCC Rcd 1135 (1988) ("*Phase I Further Reconsideration Order*"), second further reconsideration, 4 FCC Rcd 5927 (1989) ("*Phase I Second Further Reconsideration Order*"); *Phase I Order and Phase I Reconsideration Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987) ("*Phase II Order*"), reconsideration, 3 FCC Rcd 1150 (1988) ("*Phase II Reconsideration Order*"), further reconsideration, 4 FCC Rcd 5927 (1989) ("*Phase II Further Reconsideration Order*"); *Phase II Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceeding*, CC Docket No. 90-368, 5 FCC Rcd 7719 (1990) ("*ONA Remand Order*"), reconsideration, 7 FCC Rcd 909 (1992), petitions for review pending sub nom. *California v. FCC*, No. 90-70336 (and consolidated cases) (9th Cir. filed July 5, 1990); *Computer III Remand Proceeding: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991) ("*BOC Safeguards Order*"), petitions for reconsideration pending, petitions for review pending sub nom. *California v. FCC*, No. 92-70083 (and consolidated cases) (9th Cir. filed February 14, 1992); *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1 (1988) ("*BOC ONA Order*"), reconsideration, 5 FCC Rcd 3084 (1990) ("*BOC ONA Reconsideration Order*"), 5 FCC Rcd 3103 (1990) ("*BOC ONA Amendment Order*"), Erratum, 5 FCC Rcd 4045, modified, FCC 92-535 (released January 4, 1993) ("*BOC ONA Amendment Reconsideration Order*"), petitions for review pending sub nom. *California v. FCC*, No. 90-70336 (and consolidated cases) (9th Cir. filed July 5, 1990), 6 FCC Rcd 7646 (1991) ("*BOC ONA Further Amendment Order*"), petition for review pending sub nom. *MCI Telecommunications Corp. v. FCC*, No. 92-70189 (9th Cir. filed February 19, 1992).

(ii) "that the application of ONA and nondiscrimination safeguards to GTE would yield substantial public interest benefits by bringing to customers and ESPs [Enhanced Service Providers] operating in GTE's service areas the benefits of ONA, and by safeguarding against discrimination" -- such benefits appearing, after the Contel merger, "to be substantially greater than when we last examined this issue" (para. 8);

(iii) "that the geographic dispersal of GTE's service areas, and the fact that its operations are comprised to a greater extent of small, rural local exchanges, does not warrant not applying ONA and nondiscrimination safeguards to GTE" (para. 10);

(iv) "that the benefits that could be achieved in view of its size and resources outweigh the fact that it is geographically dispersed" (para. 10);

(v) "that the public interest would be served by imposing ONA requirements and nondiscrimination safeguards on GTE" (para. 10);

(vi) "that [GTE] has a substantial capacity both to discriminate against competing enhanced service providers and to implement the same nondiscrimination safeguards that are applicable to the BOCs" (para. 12);

(vii) that applying to GTE all of the annual and semiannual reporting requirements that are applicable to the BOCs "will assure achievement of our public interest objectives for application of ONA to GTE" (para. 17).

The requirements that apply to the BOCs (the "*BOC Requirements*") are the following:

(1) "Under ONA, the BOCs are required to offer an unbundled set of ONA services to [ESPs] based on expected market demand, the services' utility as perceived by enhanced service competitors, and technical and costing feasibility." *Notice* at para. 2.

(2) "The *Computer III* nondiscrimination safeguards [which] consist of Customer Proprietary Network Information ["CPNI"] rules, network information disclosure rules,

(3) "[T]he BOCs are required to file each year their projected deployment schedules for their ONA services; new ONA service requests from ESPs and ONA service requests that were previously deemed technically infeasible; SS7 [Signalling System 7], ISDN [Integrated Services Digital Network], and IN [Intelligent Network] projected deployment; new ONA services available through SS7, ISDN, and IN; various progress reports on the implementation of service-specific and long-term uniformity issues, billing information, and Operational Support System ["OSS"] services; and a list of BSEs [Basic Service Elements] used in the provision of the BOC's own enhanced services." *Notice* at para. 4.

(4) The BOCs must file semiannually "a matrix of BOC ONA services and state and federal tariffs; data regarding state and federal tariffs; the *ONA Services User Guide*; and other updated information in the areas of ESP requests, BOC responses, and services offered." *Notice* at para. 4.

DISCUSSION

I. BEFORE REVERSING ITS PREVIOUS DECISIONS AND IMPOSING THE *BOC REQUIREMENTS* ON GTE, THE COMMISSION MUST MAKE A DULY SUPPORTED DETERMINATION THAT THERE ARE NET PUBLIC INTEREST BENEFITS.

As demonstrated in Attachment A, application to GTE of the *BOC Requirements* would cost GTE nearly \$20 million in the first year, as much as \$36 million over a five-year period, and approximately \$51 million over a ten-year period. Primarily this cost would be systems and hardware costs associated with requiring access to GTE's OSS support and by password to GTE's information base. Other aspects of the *BOC Requirements* are less burdensome but would nonetheless impose unnecessary costs. GTE's Comments will address in the first instance imposition of the *BOC Requirements* as a totality; partial application is then considered *infra*.

This is not a case where the Commission is for the first time addressing whether the *BOC Requirements* should apply to GTE. When imposing the *BOC Requirements*

on the BOCs, the FCC made the firm and clear determination that GTE's characteristics were so different from those of the BOCs that a very different regulatory approach should be applied.³ Thus, the existing policy of the Commission with regard to the *BOC Requirements* is that they should **not** apply to GTE. Any decision to reverse this policy would have to be justified by a fresh examination of the facts and a supporting analysis that shows, on balance, the public interest requires applying the *BOC Requirements* to GTE.⁴

Necessarily, the Commission must reexamine the underlying logic of these requirements and conclude that, under the circumstances prevailing today, it can reach a finding that they should be applied to GTE. To impose on GTE regulations that were shaped for a class of companies (the BOCs) that consciously excluded GTE demands a fresh public interest finding that, as imposed, these identical requirements would produce net public interest benefits.

As shown *infra*, new technologies have been introduced into the network, each bringing new competitors for virtually all services of local exchange carriers ("LECs" or "exchange carriers") and dramatically eroding whatever "bottleneck" may have existed previously. It is demonstrated herein that applying the costly and burdensome *BOC Requirements* in their entirety to GTE in present circumstances is not justified.

³ *Phase II Reconsideration Order*, 2 FCC Rcd at 3101-02.

⁴ The Commission may not automatically assume the continued validity of its rules as circumstances change. *Geller v. FCC*, 610 F.2d 973 (D.C.Cir. 1979); *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1273 (D.C.Cir. 1980), *cert. denied*, 453 U.S. 913 (1981). At the same time, in departing from prior practices and adopting a new regulatory approach, an agency "must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed...." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C.Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) ("*Greater Boston*"), *quoted and relied on in Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 57 (1983) ("*Motor Vehicle*").

In making its 1987 decision that the *BOC Requirements* should not apply to GTE, the Commission left the door open to a reexamination of this decision if "it appears that GTE, Contel, and the other ITCs [Independent Telephone Companies] are not achieving the goals of CEI [Comparably Efficient Interconnection] and ONA to the extent possible, or if otherwise it appears that [they] are engaging in discrimination against enhanced service providers."⁵ GTE shows *infra* (i) that it has instituted procedures that assure it will "achieve the goals of CEI and ONA" without imposition of costly procedural and administrative requirements developed to suit entirely different companies with different systems, different operating characteristics and so forth; and (ii) that it is actively continuing its efforts to provide such assurance.

As for GTE "engaging in discrimination against enhanced service providers", GTE expresses confidence that – as on every occasion in the past when it has examined this question – the Commission will be satisfied that GTE is not engaging in discrimination against ESPs. Now as in 1987, there is a remarkable lack of any such complaints before the FCC. Indeed, GTE is aware of only a single FCC complaint. This was an informal complaint filed in 1992 involving a single incident, where the written account given by the third party involved directly contradicted assertions made by the complaining party.⁶

After all submissions in this proceeding are complete, GTE will have demonstrated that imposition of the *BOC Requirements* on GTE is not justified under the criteria stated in 1987 because:

⁵ *Phase II Order*, 2 FCC Rcd at 3102.

⁶ See Attachment B, a GTE letter dated April 27, 1992, concerning a Notice of Informal Complaint dated March 23, 1992, Voice-Tel Northwest, IC-92-04125; and a letter dated April 15, 1992 from Kay Hawkey of RE/Max Associates, Inc.

(1) It has not been shown that GTE is "not achieving the goals of CEI and ONA to the extent possible."⁷ Indeed the record will demonstrate affirmatively that GTE – given the characteristics of GTE and its operating areas – is achieving the goals of CEI and ONA to the extent possible.

(2) It has not been shown that GTE is engaging in discrimination against ESPs. Moreover, the record will demonstrate affirmatively that GTE has established and applied safeguards that assure non-discrimination.

If, after examination, the Commission were able to make a duly supported determination that there should apply to GTE some form or portion of the *BOC Requirements*, appropriate adjustments should be made reflecting actual experience gained from BOC implementation, changes in market conditions, and the distinct characteristics of GTE.

That the BOCs essentially accepted the *BOC Requirements* does not prove that, if imposed on GTE, those requirements will produce net benefits. The BOCs had been subject to the immensely burdensome and constricting separate subsidiary requirements that came out of *Computer I*⁸ – requirements the Commission itself correctly found unjustified.⁹ By comparison, the *BOC Requirements* are far less burdensome. Handcuffs seem minor compared to a ball and chain. But imposition of

⁷ *Phase II Order*, 2 FCC Rcd at 3102.

⁸ Second Computer Inquiry, Docket 20828, Final Decision, 77 F.C.C.2d 384 (1980) ("*Computer II Final Decision*"), *reconsideration*, 84 F.C.C.2d 50 (1980) ("*Computer II Reconsideration Order*"), *further reconsideration*, 88 F.C.C.2d 512 (1981) ("*Computer II Further Reconsideration Order*"), *aff'd sub nom.* Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *further recon. denied*, FCC 84-190 released May 4, 1984.

⁹ *Phase I Order*, 104 F.C.C.2d at 964: The structural separation requirements "impose significant costs on the public in decreased efficiency and innovation that substantially outweigh their benefits." In GTE's view, this judgment grounded on practical experience is eminently sound.

the *BOC Requirements* on GTE would amount to a dramatic increase in regulatory burdens.

GTE emphasizes that, in challenging the *BOC Requirements* as applied to GTE, the company's focus is on the effect of Commission action on GTE's ability to provide efficient and competitive service to its customers. There is no intent to suggest there should be any change in the regulatory treatment of the BOCs. Any and all questions and challenges raised by GTE can be dealt with by the Commission's simply concluding -- as it has four times in the past (discussed *infra*) -- that in the public interest the *BOC Requirements* should not apply to GTE.

Accordingly: The imposition on GTE for the first time of the costly and burdensome *BOC Requirements* requires a supporting analysis that shows this action can be expected to yield net public interest benefits.

II. IN VIEW OF EXPERIENCE, ARGUMENTS THAT THERE IS A NEED FOR ONA REQUIREMENTS FOR GTE ARE LESS PERSUASIVE TODAY.

- 1. The Commission has recognized that the supposed exchange carrier "bottleneck" -- which was the foundation of restrictions applied to the BOCs -- is a diminished concern in the competitive environment of today.**

In *Computer II*, when establishing the original structural separation requirement, the Commission stated its underlying rationale:

[T]he primary benefits of the policy are protection for the regulated market ratepayer against costs transferred from the competitive market ... and protection for the general public against such anticompetitive activities as denial of access and predatory pricing. ... A denial of access, for example, by a parent corporation owning basic transmission facilities, may create a bottleneck in the supply of enhanced services -- an artificial shortage that could force prices to a supranormal level.¹⁰

¹⁰ *Computer II Final Decision*, 77 F.C.C.2d at 463.

As indicated by the quoted words¹¹, the fundamental premise of the Commission's ONA program is the perception that certain exchange carriers control "bottleneck" facilities that must be used by their competitors to provide Enhanced Services. Because of this "bottleneck", exchange carriers are supposed to have the opportunity to: (i) discriminate in the provision of underlying basic network services to competing ESPs, and (ii) cross-subsidize Enhanced Service operations by over-charging for basic services, including those services needed by competing ESPs.

In *Computer II*, the Commission decided to impose on the BOCs -- not on GTE -- a structural separation requirement in order to reduce the opportunity for discrimination and cross-subsidy by "bottleneck" providers. The FCC took this action in the belief the associated costs would not "diminish [the] ability to innovate."¹² But in *Computer III*, the Commission found that structural separation requirements "impose significant costs on the public in decreased efficiency and innovation that substantially outweigh their benefits"¹³ and replaced them with nonstructural safeguards. The "benefits of structural separation" were found to be "not significantly greater than such benefits provided by nonstructural safeguards."¹⁴ In addition, the Commission determined that the "lost innovation and inefficiency" associated with structural separation requirements "render these requirements far less desirable than nonstructural safeguards."¹⁵

¹¹ See also *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Service by Bell Operating Companies*, ("BOC Separation Order"), CC Docket No. 83-115, 95 F.C.C.2d 1117 (1983) at 1142-43.

¹² *Computer II Final Decision*, 77 F.C.C.2d at 465.

¹³ *Phase I Order*, 104 F.C.C.2d at 964.

¹⁴ *Id.* at 1010.

¹⁵ *Id.* at 1012.

One of the findings that led the Commission to this conclusion was that the bottleneck concept, although still of some concern, was becoming less of an issue:

The availability of bypass and other new technologies places some limits on the BOCs' ability to shift costs from their unregulated services to their regulated offerings without reducing the demand for those offerings. This is evidenced by the increase of competition in intraLATA toll markets and the development of private networks and shared tenant services.¹⁶

The Commission added:

We believe that the discrimination potential inherent in the BOCs' control of the local exchange monopolies has eroded since the *BOC Separation Order*.... [T]he growth of bypass and other alternatives to local service, by eroding the local monopolies, will limit the effects of such discrimination to some extent.¹⁷

Anticompetitive activities, the Commission concluded, "can be adequately prevented by regulatory measures with substantially lower costs to the public than those caused by structural separation."¹⁸

In light of such factors as the increased level of competition,¹⁹ the Commission replaced full separation of the BOCs with the different and less onerous ONA requirements.²⁰ Thus, the decisions to apply less onerous ONA rules to the BOCs were largely based on the fact that the markets they serve had become subject to increasing competition.

In summary: The Commission itself has recognized that the notion of an exchange carrier "bottleneck" is a diminished concern in today's competitive environment.

¹⁶ *Id.* at 1010.

¹⁷ *Id.* at 1011.

¹⁸ *Id.* at 1013.

¹⁹ *Phase I Reconsideration Order*, 2 FCC Rcd at 3038-39.

²⁰ Similarly, in the case of AT&T, the Commission found that different and less onerous ONA requirements were required of AT&T in light of the increased level of competition. *Id.* at 3042.

2. While Commission policy favors regulatory restrictions to permit exchange carriers to compete, the *Notice* would go in the opposite direction.

The Commission's history of decisions on ONA requirements for AT&T and the BOCs shows that increasing competition is at least one legitimate reason for reducing ONA obligations. And yet, in what everyone agrees is an environment of increased competition, the *Notice* tentatively favors a dramatic increase in regulatory burdens for GTE. While Commission policy sensibly looks for ways to reduce regulatory costs and restrictions as telecommunications become still more competitive, in this case as competition increases the constrictions are wound tighter.

Competition for exchange services has increased dramatically since the adoption of ONA regulations for the BOCs. As discussed *infra*, it has increased to the point that a recent comprehensive study of the status of competition for telecommunications services concluded the idea of "a well-defined, economically impregnable 'local bottleneck' is ludicrous."²¹

If the "local exchange bottleneck" ever existed, it is disappearing rapidly. There are a number of precipitating events, including the introduction of Personal Communication Services ("PCS") technology. And entry of cable television companies into exchange telephone markets will broaden the definition of an exchange market. With open competitive entry, whatever "bottleneck" was claimed to have existed has crumbled.

The effect of additional regulations for GTE would be directly contrary to the whole spirit of Commission policy. In requiring expanded interconnection,²² at least the

²¹ Peter W. Huber, Michael K. Kellogg, and John Thorne, *The Geodesic Network II: 1993 Report on Competition in the Telephone Industry*, ("Geodesic Network II") at 2.3.

Commission recognized the need for greater freedom of exchange carriers as they face increased competitive challenges.²³ But the *Notice* tentatively increases constrictions on GTE just when exchange competition is increasing, just when exchange carriers need greater freedom from regulatory burdens in order to compete effectively. This approach, which conflicts with the Commission's own policy as well as the reality of the marketplace, is a step in the wrong direction.

Competition for all exchange carrier services, even the allegedly invincible "local dial tone" bottleneck, is in progress today -- not some time in the future. Competitive Access Providers ("CAPs"), cellular carriers, cable television firms, PCS providers, combinations of interexchange carriers ("IXCs") and wireless providers, and various combinations of the preceding entities, are either competing with exchange carriers today or are in the process of creating services that will compete directly with traditional exchange carrier offerings.

High capacity special access is highly competitive. *Geodesic Network II* notes that the CAP industry has "expanded feverishly" since 1988:

CAPs are now operating in so many cities and suburbs that it is difficult to keep a complete count. These include 24 of the top 25 metropolitan service areas, and the cities and regions they serve contain the headquarters of approximately 70 percent of the companies that appear on the Communications Week 100 list.²⁴

²² *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141 ("D.91-141"), Report and Order and Further Notice of Proposed Rulemaking, FCC 92-440 (released October 19, 1992) (the "*Special Access Order*"), *modified*, Memorandum Opinion and Order, FCC 92-552 (released December 18, 1992), *petition for review pending sub nom. The Bell Atlantic Tel. Cos. v. FCC*, Nos. 92-1619 and 92-1620 (D.C. Cir. filed November 25, 1992).

²³ See for example *Special Access Order* at para 172: "Excessive constraints on LEC pricing and rate structure flexibility will deprive customers of the benefits of competition and give the new entrants false economic signals." At 174: "[T]he Tier 1 LECs should be allowed greater freedom to adjust their rates to reflect traffic-density-related cost differences."

²⁴ *Geodesic Network II* at 2.25.

Such tremendous growth simply cannot occur unless CAPs currently have the ability to attract customers.

As for the supposed local bottleneck that would prevent effective CAP competition, "the LATA boundary at the top edge of the 'bottleneck' has thus moved down to meet the 'customer premises' boundary at the bottom edge. There is nothing left but bottle."²⁵ CAPs certainly understand and recognize these new market opportunities. They are moving rapidly to take advantage of the LEC position of being "ensnared in a tangle of tariffs and cross subsidies, price averages and equal charge rules."²⁶ This is the state of the special access market prior to the implementation of expanded interconnection.

CAPs are forming alliances with cable companies to provide a wider range of services.²⁷ "Overall, cable interests now control over 50 percent of CAP revenues. Spurred by the promise of their new alliances, cable-CAP companies are now deploying fiber-optic cable at record rates."²⁸ At least one cable company plans to offer free basic cable service to promote telephone services.²⁹

Radio-based services are other direct substitutes for local services furnished by exchange carriers and technology improvements are driving their introduction into the local market. Traditional LEC land-line services are vulnerable to these new market entrants. *Geodesic Network II* describes this situation:

²⁵ *Id.* at 2.50.

²⁶ *Id.* at 2.49.

²⁷ Two more major cable companies have each purchased 20% of Teleport Communications Group. "Teleport Takes on Two New Cable Owners", Telephone Engineer & Management, January 15, 1993, at 21.

²⁸ *Geodesic Network II* at 2.59.

²⁹ *Id.* at 2.66 and n.232.

No simple addition of revenues or tally of local telco lines begins to capture how competition is now emerging in the local exchange. The most important new technologies do not use copper wire at all.³⁰

It also predicts that:

Within the next few years, radio-based services will possess spectrum licenses sufficient to offer as much local carrying capacity as is currently being used by *all* landline customers.³¹

and that:

Two-way radio services are now poised to reach the mass residential market.³²

Further, this competition is not confined to major metropolitan areas. It has become diffused over wide geographic areas encompassing even the smaller, more rural exchanges served by GTE. For example, even in the largely rural and suburban areas served by GTE in Wisconsin, GTE has lost a substantial proportion of its toll minutes of use to rival firms. Cellular companies are already price competitive for smaller volume local users, both residence and business.³³

The relevance of the above discussion to the proposed application of the *BOC Requirements* to GTE is simple: to be successful GTE must offer competitively priced, high value services to customers. The addition of costly and burdensome new rules that complicate interaction with customers and add little or no benefit directly to customers will harm GTE's ability to compete effectively.

In summary: The markets for all exchange carrier services face competition today. Tomorrow they will be still more competitive. While Commission policy favors

³⁰ *Id.* at 2.2.

³¹ *Id.* at 2.20.

³² *Id.* at 2.23.

³³ See Attachment C, an abstract of E.C. Beauvais, "Local Exchange Service: Where is Competition Taking Us?", Paper presented to 23d Annual Conference of the Institute of Public Utilities, Michigan State University, December 11, 1991, publication forthcoming.

reducing regulatory constrictions to permit exchange carriers to compete, the *Notice* proposes to go in the opposite direction by dramatically increasing regulatory costs and burdens for GTE as the environment becomes still more competitive.

III. UNDER THE CRITERIA EMPLOYED BY THE COMMISSION IN DETERMINING ON FOUR SEPARATE OCCASIONS THAT BOC-TYPE RESTRICTIONS SHOULD NOT APPLY TO GTE, IT IS TODAY EVEN CLEARER THAT THE COMMISSION SHOULD MAKE THIS SAME DETERMINATION.

1. Overview.

This proceeding concerns imposition of a set of burdensome restrictions on a party (GTE) that was not previously subject to those restrictions. GTE was not subject because, after exhaustive study, the FCC determined that the characteristics of GTE and the circumstances affecting its operations justified different treatment from that accorded the BOCs.

This same decision was reached on four different occasions in respect of various types of restrictions; and it was grounded on certain criteria. Facts recognized in the *Notice* itself³⁴ (and elaborated *infra*) demonstrate that under the criteria the Commission has applied in the past, there is today even less justification for the imposition of the *BOC Requirements* on GTE.

The *Notice* (at paras. 6, 8, 10) reaches a tentative conclusion that the *BOC Requirements* should now apply to GTE. The principle justification for doing so is a

³⁴ "GTE's merger with Contel has increased the extent to which it serves sparsely populated areas." *Notice* at para. 10. Also: "Following the Contel merger, GTE provides service in 40 states. The merger added approximately 20% more access lines, but nearly doubled the total service territory. BOC serving areas are three times as densely populated as GTE's areas and cover no more than 39 LATAs, while GTE serves markets that are geographically dispersed across portions of 139 LATAs. In addition, the BOCs serve very large markets including New York, Chicago, Houston, and Los Angeles, whereas GTE serves much smaller markets and has a major presence in only two of the top fifty markets (MSAs)." *Notice* at n.29.

semantic inversion: the restrictions on GTE are characterized as "benefits."³⁵ Because GTE (with the acquisition of Contel) is now larger and serves more customers, the "benefits" of imposing ONA restrictions are said to be greater.³⁶ This ignores the corollary: that the costs and burdens of imposing ONA on a larger operation would also be greater.

The logic the Commission employed in four times refusing to apply BOC-type restrictions to GTE compared benefits and costs/burdens associated with imposing these restrictions on a company with highly dispersed and predominantly rural/suburban operations. Based on this comparison, the Commission concluded the aggregate public interest dictated not imposing those restrictions.

Now the question is looked at again with "the extent to which [GTE] serves sparsely populated areas" actually increased. But the *Notice* reflects no assessment whatever of costs and burdens.³⁷ The apparent assumption is that imposition of ONA requirements represents nothing but benefits. This collides with the logic employed by the Commission in making its prior decisions. The Commission cannot reach a

³⁵ For example: "The new scope of GTE's total operations significantly increases the benefits that it could bring to the public by its conformance with ONA." *Notice* at para. 8. "[W]ith the increased number of exchanges and access lines that [GTE] now serves, imposing ONA requirements on GTE will bring substantially more customers the benefits of ONA." *Id.*

³⁶ "Accordingly, we tentatively conclude that the application of ONA and nondiscrimination safeguards to GTE would yield substantial public interest benefits by bringing to customers and ESPs operating in GTE's service areas the benefits of ONA...." *Id.*

³⁷ "We tentatively conclude that the geographic dispersal of GTE's service areas, and the fact that its operations are comprised to a greater extent of small, rural local exchanges, does not warrant not applying ONA and nondiscrimination safeguards to GTE." *Notice* at para. 10. In reaching this conclusion, the Commission relies on what it decided was not a decisive factor on four previous occasions: GTE's size. "While GTE has been more geographically dispersed than any BOC and the Contel merger has made it more so, it is also larger than many of the BOCs by many measures. We tentatively conclude that the benefits that could be achieved in view of its size and resources outweigh the fact that it is geographically dispersed." *Notice* at para. 10.

defensible conclusion on the aggregate public interest benefits of imposing the *BOC Requirements* on GTE without an assessment of the costs and burdens that on four previous occasions justified refusing to apply those restrictions to GTE.

In other words, if the greater size of GTE indicates an increase in the "benefits" of imposing ONA, the very same logic would indicate an increase in costs and burdens. Moreover, under the logic the Commission applied four times in the past, the fact that GTE today is proportionately even more dispersed and rural/suburban than the BOCs indicates the costs and burdens of imposing BOC-type restrictions have increased to an even greater degree than GTE's increase in size. If the benefits have increased but the costs and burdens have increased still more, then surely the Commission must justify a departure from the carefully created pattern of Commission decision-making -- heavily litigated by many of the same parties appearing in the instant proceeding -- that reached a contrary conclusion.

2. The FCC has closely examined GTE vis-a-vis the BOCs and four times found important differences justify different treatment.

Pre-divestiture, the question of how to treat GTE was addressed in *Computer II*. The FCC at one point proposed to place on GTE the same restrictions as were to be applied to the Bell System; on considering the evidence more carefully, the decision was to treat GTE differently for a number of reasons that were carefully articulated.³⁸

³⁸ *Computer II Reconsideration Order*, 84 F.C.C.2d at 72-75. "Concerning enhanced services, the most compelling argument tendered is that GTE is dependent upon AT&T for the vast majority of its interstate transmission needs." *Id.* at 72-73. "With respect to CPE ... [g]iven that GTE's operating territories are predominantly rural, it is questionable whether the costs of [structural] separation ... is warranted. Absent more compelling facts, we conclude that the public will be better served if the separate subsidiary requirement is removed for GTE for its provision of CPE." *Id.* at 73.

Post-divestiture, in *Computer III*, the FCC decided that different circumstances justify different treatment of GTE in the context of Enhanced Services.³⁹ The Commission stressed the differences between GTE and the BOCs. "GTE is the ITC most like a BOC, yet the record reveals that it has features that clearly distinguish it."⁴⁰ Proceeding to discuss examples to illustrate this conclusion, the Commission's first distinction related the nature of the service areas served by either GTE or a BOC to the ability to exercise monopoly control:

[A]n analysis of GTE's service areas demonstrates that although in the aggregate GTE is similar in size to each BOC, unlike the BOCs, its service areas are distributed nationwide in a large number of noncontiguous geographic areas. This circumstance effectively prevents GTE from exercising monopoly control in large regions of the country, comparable to those served by the BOCs.⁴¹

A second distinction concerned the size and character of GTE's service areas:

Also, compared to the BOCs, GTE service areas tend to be smaller (fewer access lines per exchange), less densely populated (fewer access lines per square mile), and they contain a smaller percentage of business customers.⁴²

"These basic characteristics of GTE," the Commission said in 1987, "have not changed significantly since 1980, when we decided to refrain from applying our *Computer II* structural separation requirements to GTE."⁴³ The Commission saw the consequences of these differences as reducing GTE's comparative opportunity for anticompetitive action:

³⁹ *Phase II Order*, 2 FCC Rcd at 3099-3102. "[W]e conclude that the public interest is best served ... by not applying either CEI/ONA or the other *Phase I* nonstructural safeguards to any of the ITCs [Independent Telephone Companies]." *Id.* at 3102.

⁴⁰ *Id.* at 3101.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*